

HIV and the Criminal Law

Most of the time, whether you tell others (or “disclose”) that you are living with HIV is up to you. You may choose not to disclose because you are not sure how to tell people, or because of stigma and discrimination against people living with HIV. You may also choose not to disclose because of homophobia, racism, transphobia, or discrimination against Two-Spirit people.

The situation is different when it comes to sex partners. In Canada, the criminal law says that, in certain circumstances, you must tell your sex partners that you are living with HIV *before you have sex*. This is sometimes referred to as a “**legal duty to disclose**.”

But you do not always have to disclose to your sex partner under the criminal law. You are only required to tell your sex partner that you are living with HIV before you have sex when there is a “**realistic possibility**” that you could pass on (transmit) HIV. If you do not tell your sex partner before you have sex where there is a “realistic possibility” of passing on HIV, you can be charged with aggravated sexual assault, even if your partner does not get HIV.

Unfortunately, courts have not clearly defined what “realistic possibility” means. So sometimes it can be really hard to figure out if you have a legal duty to disclose.

As of the date of publication of this document (September 2023), based on Ontario policy and recent court cases, here is guidance for people living with HIV in Ontario:

There is no legal duty to disclose in these situations:

- Kissing or other activities that have no risk of HIV being passed on.
- Vaginal, anal, or oral sex if your viral load is under 200 copies/ml blood for at least six months. This is the case whether or not a condom is used.
- Vaginal, anal, or oral sex if you use a condom properly and it does not break and your viral load is in between 200 and 1500 copies/ml blood.

There is a legal duty to disclose in these situations:

- Prosecutions may take place in all other circumstances (prosecutions for oral sex alone are less likely):
 - Vaginal, anal, or oral sex if your viral load is over 1500 copies/ml blood, regardless of whether a condom is used.
 - Vaginal, anal, or oral sex if your viral load is between 200 and 1500 copies/ml blood and a condom is not used. If a condom is used but not used properly or breaks, and there is no disclosure, a prosecution may still take place.

If you are threatened with criminal charges, please contact us (416.340.7790/1.888.705.8889) or a criminal lawyer immediately. If police want to ask you questions, you do not have to answer them (you should only tell them your name and date of birth). Anything you say to police at any time may be used as evidence against you. You have the right to speak to a lawyer in private before answering questions from police. You should only talk to HALCO or a criminal lawyer about this situation.

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